IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

—v.—

LILLIAN M. ORR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

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FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of approximately 200,000 members dedicated to de-

fending the rights of all persons to equal justice under the law. Recognizing that role-typing by sex is a pervasive problem in society, and affects women most harshly by confining their opportunities and chilling their aspirations, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

The ACLU has participated in most of the cases before this Court challenging sex-based discrimination under the fifth and fourteenth amendments. Lawyers associated with the ACLU presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later represented amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975) (heard in tandem with Taylor v. Louisiana, 419 U.S. 522 (1975)), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb 430 U.S. 199 (1977), petitioners in Struck v. Secretary of Defense, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants, appellees and amicus curiae in this Court in several other gender discrimination cases, including Craig v. Boren, 429 U.S. 190 (1976).

Amicus believes that the answer to the question presented in this case, whether the equal protection principle tolerates use of gender as a basis for allocating spousal support obligations, is of vital significance to the achievement of full equality of the sexes. While such laws do discriminate against men, they discriminate more insidiously against women by reinforcing attitudes and practices that put "women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973). Needy spouses will retain full protection if the gender line now held by a dwindling minority of states is eradicated as an unfair and unsupportable means of regulating relations between individuals of equal dignity.

Because of the contribution the American Civil Liberties Union Women's Rights Project has made to the reasoned development of the law in this area, we believe our brief will be of substantial assistance to the Court in the resolution of the issues raised by this case.

We have sought consent to filing of this brief from appellant and appellee. Appellant has given consent in a letter filed herewith. Appellee has refused consent.

Respectfully submitted,

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Interest of Amicus

The interest of amicus appears from the foregoing motion.

Opinions Below

The opinion of the Supreme Court of Alabama is reported at 351 So.2d 906 (1977). The opinion of the Court of Civil Appeals of Alabama is reported at 351 So.2d 904 (1977). The Circuit Court of Lee County, Alabama, did not issue an opinion.

Jurisdiction

On November 10, 1977, the Supreme Court of Alabama entered an order that its Writ of Certiorari of May 24, 1977, to the Court of Civil Appeals be quashed as improvidently granted. It denied Appellant's petition for the writ, thereby making final the judgment of the Court of Civil Appeals. The lower court's judgment upheld the validity of the alimony provisions of the Code of Alabama in the face of Appellant's constitutional challenge. Rehearing in the Supreme Court of Alabama is not available since a motion for rehearing will not be received by that Court when the subject is an order denying certiorari. Alabama Rule of Appellate Procedure 39(j). Notice of Appeal to the Supreme Court of the United States was filed on January 30, 1977, and the Jurisdictional Statement was filed on February 8, 1978. On April 26, 1978, Appellee filed a Motion to

Affirm. Probable jurisdiction was noted on May 30, 1978. Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(2).

Constitutional And Statutory Provisions Involved

The United States Constitution, Amendment XIV, §1, provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Code of Alabama (1975), §§30-2-51 through 53* provides:

> §§30-2-51. If the wife has no separate estate or if it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order

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* Formerly Code of Alabama (1940), Title 34, §31-33. The Order of the Supreme Court of Alabama was entered after a recodification which enacted a few minor changes that have no bearing upon the issues presented herein.

to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and the condition of his family.

§30-2-52. If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

§30-2-53. If the divorce is in favor of the husband for the misconduct of the wife, and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

Question Presented

Whether §§30-2-51 through 53, Code of Alabama (1975), * by providing that only husbands, and not wives, may be required to pay alimony, denies the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution.

Statement Of The Case

In the Alabama court of first instance, the appellant's wife sought and was granted a judgment for alimony. This judgment was based on Tit. 34 §31, Code of Alabama (1940), ** which provides that, in appropriate circumstances, the judge, upon granting a divorce, "may decree to the wife an allowance out of the estate of the husband " (emphasis supplied). The court acknowledged that Alabama Supreme Court precedent pre-

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*/ Formerly Code of Alabama, Title 34, §31 (1940). The Order of the Supreme Court of Alabama was entered after recodification, which enacted a few minor changes that have no bearing upon the issues presented herein.

** This is now §30-2-51 of the 1975 Code. See preceding note.

cluded interpretation of the statute to permit a decree awarding alimony to a husband. Nonetheless, it rejected the husband's contention that the statute unconstitutionally discriminated on the basis of gender.

The rejection of this constitutional challenge was unanimously upheld by the Alabama Court of Civil Appeals. Orr v. Orr, 351 So.2d 904 (March 16, 1977, rehearing den. April 12, 1977). The Alabama Supreme Court, in a per curiam decision without opinion, quashed the writ of certiorari from this judgment as improvidently granted. 351 So.2d 906 (Nov. 10, 1977). Mr. Justice Almon, joined by Mr. Justice Bloodworth, wrote a brief concurring opinion, and Mr. Justice Jones, a detailed dissent.

The Alabama Court of Civil Appeals adopted "as [its] own" language and reasoning of the Georgia Supreme Court in Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. den., 421 U.S. 929 (1975), which, in turn, had found controlling this Court's decision in Kahn v. Shevin, 416 U.S. 351 (1974). The Georgia Supreme Court had ruled that "the ratio decidendi of Kahn is dispositive of the issues presented here" (206 S.E. 458, 459). The Alabama Court of Appeals followed suit, ruling that "the reasons [advanced in Kahn] are equally applicable in the instance of a wife involved in seeking alimony pursuant to a divorce" (351 So.2d at 905).

No attempt was made by the courts below to grapple with the glaring distinctions between Kahn and the case at hand. No attention was paid to, or even mention made of, any decisions of this Court subsequent to Kahn. Consequently, the Alabama Court of Civil Appeals failed to inquire whether the gender line drawn by the Alabama statute served to reinforce "the role-typing society has long imposed" upon both men and women (Stanton v. Stanton, 421 U.S. 7, 15 (1975)), whether that sharp line was the "byproduct of a traditional way of thinking about females" (Califano v. Goldfarb, 430 U.S. 199, 223 (1977)(Stevens, J. concurring)), whether it was rooted in the "archaic and overbroad" generalization that wives are dependent, husbands independent, gross characterizations "not . . . tolerated under the Constitution" (Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975)), whether assumptions underlying the statute about "the presumed role in the home" of women bore a substantial relationship to present reality (Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975)), or whether the Alabama "statutory structure and its legislative history revealed that the classification was . . . enacted as compensation for past discrimination" (Califano v. Webster, 430 U.S. 313, 317 (1977)).

Inexplicably, the Alabama Court of Civil Appeals made no attempt whatever to reconcile its decision with the holdings in

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), that the legislature, in granting social security benefits, could not discriminate against widowers by resorting to a gender criterion in lieu of a sex-neutral, functional classification. Nor did that court advert to the heightened review standard for line-drawing by sex articulated in Craig v. Boren, 429 U.S. 190 (1976). As far as the jurists both on the Alabama Court of Civil Appeals and on the Alabama Supreme Court (other than dissenting Mr. Justice Jones) were concerned, this Court's 1975-1977 gender discrimination decisions might never have been written.

As already indicated, the Supreme Court of Alabama disposed of this case per curiam without opinion. Mr. Justice Almon's very brief concurring opinion refers to no decision of this Court; disregarding the careful limitations marked by the Court in Califano v. Webster, 430 U.S. 313 (1977) (per curiam), and Craig v. Boren, 429 U.S. 190 (1976), Mr. Justice Almon's opinion broadly states "statutes which grant to women rights which men do not possess are not unconstitutional" (351 So.2d 906). Only Mr. Justice Jones, in his dissenting opinion, considered decisions and authorities subsequent to Kahn. Finding "the assumption that wives may depend upon their husbands for support, but husbands never depend on their wives . . . has no rational basis in

reality" (351 So.2d at 908) and that Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) "evinces a shift in the Court's approach to sex-discrimination cases" (351 So.2d at 908), he concluded that the Alabama alimony statute was unconstitutional.

Summary Of Argument

I.

The Alabama alimony statute unconstitutionally discriminates on the basis of gender. The sharp sex line it draws reinforces "the role-typing society has long imposed" upon men and women [i.e., husband at work, wife at home] (Stanton v. Stanton, 421 U.S. 7, 15 (1975)) and invidiously discriminates against spouses who do not conform to this type casting. The rigid gender classification at issue is the "byproduct of a traditional way of thinking about females" (Califano v. Goldfarb, 430 U.S. 199, 223 (1977)(Stevens, J. concurring)). Riveted to a "presumed role" for women that bears no substantial relationship to present reality (Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975)), the statute rests on "archaic and overbroad" generalizations about women and men "not . . . tolerated under the Constitution" (Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)).

II.

The equal protection clause safeguards not only women, but also men, against discrimination, for sex lines in the law generally cut with two edges. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The Alabama alimony statute unfairly and unconstitutionally discriminates against husbands who elect to stay at home and care for the family, or who, relying on their wives' ability and desire to make the major contribution to the financial support of the family, select a less remunerative career, or who, because of involuntary disability, are necessarily dependent on their wives. The unwarranted assumption inherent in the Alabama statute as to the wife's proper role in the family is increasingly removed from reality. Cf. Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975).

III.

Classification by gender, to be permissible, "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). The discrimination mandated by the Alabama alimony statute is not "substantially related" to achievement of an important

governmental objective. While "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] . . . an important governmental objective," (Califano v. Webster, 430 U.S. 313, 317 (1977)(per curiam), "compensatory" discrimination is justified only if (1) the history of the challenged provision reveals a genuine intention to remedy past discrimination against women; and (2) the challenged scheme actually operates "directly to compensate women for past economic discrimination," without denigrating the status of gainfully-employed women. See Califano v. Webster, supra, 430 U.S. at 317-318.

The Alabama alimony statute meets neither condition. There is no evidence whatever that the legislation, which has read the way it does for more than one hundred years, is anything other than "the accidental byproduct of a traditional way of thinking about females." Califano v. Goldfarb, 430 U.S. 199, 223 (1977)(Stevens, Jr., concurring). And the challenged scheme does not seek to compensate women for past economic discrimination; it simply helps to channel them into traditional roles. Moreover, to the extent the Alabama statute rewards women for relinquishing gainful employment to care for home and children, that purpose can be achieved no less effectively without discriminating against husbands.

IV.

The gender discrimination effected by the Alabama statute is not fairly and substantially related to the objective of protecting the parent who stays at home. The present reality is that the majority of wives with school-age children are gainfully employed outside the home. * Since the award of alimony is made by the court on a case-by-case, individualized basis, there can be no tenable reason for excluding husbands a priori. "[T]he administrative convenience in dealing with women as a class is insufficient justification" for resort to a sharp sex line (Taylor v. Louisiana, 419 U.S. 522, 535 (1975)), all the more so for a decision of the kind here at issue, where adjudication is not accomplished lump fashion, but turns on facts and circumstances peculiar to each case.

Since the gender line drawn by the Alabama alimony statute is unconstitutional, the case should be remanded to the Alabama Supreme Court for that tribunal's determination of the proper, sex-neutral application of the state's law. See Stanton v. Stanton,

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* As of March, 1975, 54.8% of mothers with children aged 6 to 17 were in the work force. U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN WORKERS TODAY 4(1976).

421 U.S. 7, 17-18 (1975).

ARGUMENT

I.

THE ALABAMA ALIMONY STATUTE DISCRIMINATES ON THE BASIS OF GENDER IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The Alabama Alimony Statute Unfairly and Unconstitutionally Reinforces "Role-Typing."

Section 30-2-51 Code of Alabama, *authorizes an award of alimony "to the wife" out of the estate of "the husband." The Alabama Supreme Court has construed this provision as precluding an award of alimony to the husband. Davis v. Davis, 279 Ala. 643, 189 So.2d 158 (1966). This preclusion reinforces the "role-typing" of both husbands and wives that the Constitution forbids. Cf. Stanton v. Stanton, 421 U.S. 7, 15 (1975).

If the Alabama legislature sought fairly and equitably to compensate spouses who devoted themselves to home and children rather than building an outside career, resort to a gender criterion would be altogether inappropriate. Since an award of alimony is tailored, in any event, to the particular facts and circumstances of the individual case, the court could determine

* See note on p. 7, supra.

whether a spouse should be granted alimony without regard to gender. The need of one spouse, the resources of the other, would be principal guides. Rather than prescribing an unprejudiced, gender-neutral rule, however, the Alabama statute erects an absolute bar to alimony for a husband. It thereby leads both husband and wife to assume roles and pursue employment which neither might choose absent government steering.

Since the husband cannot look to his wife for alimony in case of divorce, he is impelled to assume a role and pursue a career that will assure him reasonable maintenance from other sources. Under Alabama's sex discriminatory scheme, a husband cannot afford to work as the family's principal homemaker if this should be his wish and his wife's preference. Nor can he afford to pursue any other primary activity that will not provide adequate maintenance in the event of divorce. Thus, for example, a husband who would like to be a poet or a painter and whose family can maintain an adequate living standard on his wife's earnings, is discouraged by the Alabama alimony statute from fully developing his talent and pursuing his aspiration. Such discrimination against him, solely because he happens to be a man, is wholly arbitrary.

Nor is the discrimination mandated by the Alabama statute felt only by the husband. Just as the scheme pushes the man into gainful employment, so it steers the woman into

the home. Someone will take care of the home and the children and, if it cannot be the husband, the wife is usually the only alternative. In short, Alabama's rule, affording security to some wives, but no husbands, against the loss of spousal income, imposes an official preference for a particular allocation of family responsibilities -- one under which the wife plays the dependent role. *

The Alabama statute thus limits a married couple's choice to divide responsibilities in the manner that best fits the

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* By 1976, only six states imposed no obligation on the wife or ex-wife for support of her husband or former husband: Alabama (Ala. Code, §30-2-51 through 53); Georgia (Ga. Code Ann. §30-202-206, 209, 213); Mississippi (Miss. Code Ann. §93-5-17, 23); South Carolina (S. Car. Code Ann. §20-112, 113); Tennessee (Tenn. Code Ann. §36-820); and Wyoming (Wyo. Stat. Ann. §20-36, 58, 63). At least since approval by the Commissioners on Uniform State Laws of the Uniform Marriage and Divorce Act (1971), the marked trend in the states has been toward wholly sex-neutral alimony statutes. For a model, see §308 of the Uniform Act.

pair's own talents, preferences and capacities. The law significantly influences both husbands and wives to conform to traditional notions about their respective roles. It is exactly this kind of line drawing -- legislation on the basis of "role-typing" (Stanton v. Stanton, 421 U.S. 7, 15 (1975)), "a traditional way of thinking about females" (Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)), "archaic and overbroad" generalizations (Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975), and "the presumed role in the home" of women (Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975)) -- that this Court, since Frontiero v. Richardson, 411 U.S. 677 (1973), consistently has condemned as inconsonant with the equal protection clause.

B. The Alabama Alimony Statute Unfairly and Unconstitutionally Discriminates Against Husbands.

While women have been the principal victims of gender discrimination, sexual stereotyping of men is also alien to the command of the equal protection clause. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Note, 89 Harv. L. Rev. 95 (1975). To assume that only wives will find themselves at divorce without independent means and without the skills and experience necessary for gainful employment, is to indulge in the sort of "archaic and overbroad" generalization (Schlesinger v.

Ballard, 419 U.S. 498, 508 (1975)), and "assumptions as to dependency" (Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975), this Court has declared intolerable under a meaningful equal protection standard. See Califano v. Goldfarb, 430 U.S. 199 (1977); Note, 91 Harv. L. Rev. 177 (1977). Moreover, the assumption that only women are destined to be financial losers when a marriage breaks down is increasingly removed from reality now that women are entering and remaining permanently in the paid labor force in dramatically large numbers. See especially Taylor v. Louisiana, 419 U.S. 522, 535 n. 17 (1975), noting that "in October, 1974, 54.2% of all women between 18 and 64 years were in the labor force" and that "51.2% of the mothers [of school age children] whose husbands were present in the household were in the work force." *

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* As of June 1977, 56.1% of all women between 20 and 64 were in the paid labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings Table A-3 (July 1977). By March, 1977, women constituted 41.1% of the total labor force. Hayghe, Marital and Family Characteristics of Workers, Tables 1 & 3, Monthly Labor Review, Bureau of Labor Statistics, U.S. Dep't of Labor (Feb. 1978).

Indeed, the assumption that only wives, never husbands need alimony is the prototypical "automatic reflex" based on "habit, rather than analysis or actual reflection" this Court has encountered and condemned in recent Terms. See Califano v. Goldfarb, 430 U.S. 199, 222 (1977)(Stevens, J. concurring).

The discrimination based on this assumption unfairly deprives of alimony all husbands who do elect to stay home and take care of the family and who, at divorce, find themselves in exactly the same situation as the wife who has accepted the homemaker role. This discrimination also unfairly deprives of alimony the husband who, relying upon his wife's ability and willingness to provide the family's principal financial support, selects a less remunerative career than he might otherwise choose. And, of course, this discrimination unfairly deprives of alimony the husband who, because of an involuntary disability, is necessarily dependent on his spouse, and who, if the situations were reversed, would be required to pay alimony to his wife.

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), this Court held unconstitutional, as based on unwarranted assumptions concerning the wife's role in the family, the denial to a surviving husband of Social Security benefits the statute accorded a similarly situated surviving wife. The reasons that determined

the Court's judgments in Wiesenfeld and Goldfarb apply with force here. It is unconstitutional for Alabama, on the basis of unwarranted assumptions as to the wife's role in the family, to withhold from a husband after termination of the marriage those benefits which the statute provides for a similarly situated wife.

C. By Discriminating on the Basis of Gender, the Alabama Alimony Statute Does Not Substantially Serve an Important Governmental Objective.

Classification by gender, although not yet declared by the majority of this Court inherently suspect (Stanton v. Stanton, 421 U.S. 7, 13 (1975)), is properly regarded under the Court's 1975-1977 holdings as prima facie unconstitutional. Gender lines in the law can escape condemnation only if they "serve important governmental objectives" and are "substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976); See Note, 91 Harv. L. Rev. 177 (1977). The burden of showing that these conditions are met is upon those urging the classification's propriety.

The Alabama Court of Civil Appeals reasoned that "it is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed." 351 So.2d at 905. This may be

true, but it is irrelevant to the equal protection issue raised here. Surely, there are many women who forego career development in order to raise a family and support their husbands' careers. At divorce, they find themselves without means and the skills for gainful employment. Beyond question, a state properly may provide a cushion for such women by authorizing an award of alimony. But to conclude from this that the state may therefore discriminate against those husbands who find themselves in exactly the same position goes far beyond rational classification in pursuit of a constitutionally permissible objective. It is indeed appropriate for a state to require a husband to provide for the needs of a dependent wife. But to meet the equality principle's measure, the state must also provide a remedy for a husband where circumstances warrant an alimony decree against the wife. The alimony applicant's need (not his or her sex), in view of the relative financial positions of the parties, is the relevant issue.

The sole rationale advanced by the Alabama courts to support this discrimination is Kahn v. Shevin, 416 U.S. 351 (1974), in which this Court upheld a real property tax exemption granted to the blind, the totally

disabled, and widows but not widowers. * But the Alabama courts not only overlooked the very significant distinctions between Kahn and the case at hand, they also took no account of the substantial inroads made upon Kahn by this Court's subsequent decisions in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977).

1. The distinction between Kahn and the case at hand.

First, and perhaps most significantly, the impracticality of case-by-case ruling was a prime factor in Kahn. The $15 tax break there at issue ** simply would not make

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* In the version effective from December 31, 1971, through the date of this Court's decision, the statute (Fla. Stat. § 196. 202) read:

> Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

** Property to the value of $500 was exempt from tax. At the tax rate applicable when this Court heard Kahn, the saving amounted to $15.

sense if administrators were called upon to render individual determinations of entitlement. By contrast, alimony is not awarded categorically. Determination whether there shall be an award and, if so, its amount, calls for a careful evaluation of the individual case before the court.

In Kahn, the state argued precisely that point. It urged that because "the financial impact of spousal loss" is generally much greater for women than for men, making the tax exemption available only to women was reasonable in light of the state's strong interest in avoiding the expense and burden of case-by-case adjudication. A gender-neutral rule would lead to the same results in most instances but the cost of administering such a rule would be prohibitive.

Here, no such argument is possible. The award of alimony under Alabama law is discretionary with the court and it is only for wives who establish need. Thus, it cannot be argued that Alabama, like Florida in Kahn, is simply using female gender as a substitute for the determination of need or for dependency adjudications. Moreover, because the parties to a divorce are already before the court, and may actively litigate their relative financial resources and needs, scant additional administrative expense would be entailed were a husband permitted to assert an alimony claim. Moreover, any additional expense would not, as in Kahn,

be disproportionate to the benefit at stake. Nor would the expense deplete a limited state budget available for aiding the needy. Accordingly, the gender classification could not possibly be rationalized on the basis of administrative convenience, or as a means to spare the public purse. Cf. Califano v. Goldfarb, 430 U.S. 199, 235 (1977)(Rehnquist, J. dissenting); Frontiero v. Richardson, 411 U.S. 677, 688-690 (1973) (firmly rejecting the administrative convenience argument). In sum, in the present case, unlike Kahn, "the administrative convenience in dealing with women as a class is insufficient justification" for discriminating against men. Taylor v. Louisiana, 419 U.S. 522, 535 (1975). Women are not given alimony as a class, but only on a case-by-case basis; equal treatment for similarly situated men would occasion no disproportionate expense or inconvenience.

Second, while Kahn upheld a statute granting a tax benefit to the widow, that benefit did not perceptibly type-cast women as subordinate to men. Far more clearly, the discrimination visited upon the husband by the Alabama alimony statute stamps women as persons assigned a special place in a world controlled by men. By steering the husband out of the home, it steers the wife into it and keeps her there, thus discouraging wives from achieving economic self-sufficiency. As Mr. Justice Brennan so aptly expressed it, this insidious form of discrim-

ination, "in practical effect," puts "women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973).*

Third, the small tax break at issue in Kahn could not affect the husband's and wife's freedom to assume the roles and careers they found most suitable. The prospect of an annual $15 tax saving for real-property owners upon the death of a spouse could have no bearing whatever on a couple's decisions as to division of responsibilities between husband and wife. In contrast, the discriminatory statute challenged here, by attempting to allocate spousal support obligations, directly intrudes into this intimate area of family choice in such a way as to reinforce traditional gender roles.

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* Feminist advocates have repeatedly pointed out that laws using sex as a basis for allocating spousal support or alimony obligations, although they do discriminate against men, discriminate much more harshly against women, a point that should be clear to anyone willing to scratch beneath the surface. See, e.g., BROWN, FREEDMAN, KATZ & PRICE, WOMEN'S RIGHTS AND THE LAW 129 (Praeger 1977).

Fourth, in Kahn, real property tax legislation was at issue. In wielding the taxing power, legislatures traditionally have been left great leeway. Kahn v. Shevin, 416 U.S. 351, 355, 356 (1974).* In the present case, however, the question is not whether the state may give categorical tax benefits to the wife it does not give to the husband, but whether needy wives and husbands are to stand on the same footing vis-à-vis well-endowed spouses. The sex discriminatory scheme at issue here directly affects the inter sese relationship between the spouses. To this extent, the Alabama statute entails discrimination even more reprehensible than that invalidated in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977).

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* See generally Bitker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L.J. 51 (1972). Had Mel Kahn succeeded, what response to other property owners excluded from the exemption, the deaf, for example, or the never married or divorced woman? But cf. Cummings v. Board of Education, 175 U.S. 528, 545 (1899)("[A]ll admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class because of their race . . . .").

Kahn, therefore, far from controlling the instant case, is wholly inapposite to it.

2. Weinberger v. Wiesenfeld and Califano v. Goldfarb, rather than Kahn, are the pertinent analogues.

This Court's decisions in cases subsequent to Kahn demonstrate unequivocally that the courts below read that decision far too expansively. For the position that "statutes which grant to women rights which men do not possess are not unconstitutional," 351 So.2d at 906 (Almon, J. concurring), collides head-on with the Court's judgments in Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Indeed, even when laws discriminating against men are purportedly intended to remedy past discrimination against women, their real purposes and actual effects have been carefully scrutinized by this Court. Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Schlesinger v. Ballard, 419 U.S. 198 (1975). As shown above, the discrimination upheld in Kahn did not channel a woman's decisions and occupations and, as subsequent decisions have emphasized, was perceived by this Court as having a remedial purpose. Craig v. Boren, 429 U.S. 190, 198 n. 6 (1976); Califano v. Goldfarb, 430 U.S. 199, 209 n. 8 (1977). As shown below, the Alabama alimony statute cannot

candidly be characterized as a remedy for the role-typing and limited opportunity-structure women have long endured.

Kahn, if it has survived subsequent decisions of this Court to any extent, has surely been confined to the narrow issue there presented. That issue, as demonstrated above, was wholly different from the one raised by the case at hand. The statute in the present case discriminates arbitrarily and unnecessarily on the basis of unwarranted assumptions as to the husband's and wife's role in the family. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), by holding that the Social Security Act may not, on the basis of such assumptions, withhold benefits from the widower that it grants to the widow, are therefore the pertinent analogues.

D. The Alabama Alimony Statute is Not Supportable as "Compensatory" Legislation.

"Reductions of the disparity in economic conditions between men and women caused by the long history of discrimination against women [is] . . . an important governmental objective." Califano v. Webster, 430 U.S. 313, 317 (1977). But a genuine claim that a statute pursues this objective is possible only if (1) the statutory structure and

legislative history reveal that the classification was in fact enacted to compensate for past discrimination, and (2) the classification does not in fact penalize women. This Court has squarely so ruled in Califano v. Webster, 430 U.S. 313, 316-317 (1977) (per curiam):

> To withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective. Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). But "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975). Accordingly, we have rejected attempts to justify gender classifications as compensation for past discrimination against women when the classifications in fact penalized women wage earners, Califano v. Goldfarb, 430 U.S. at 209 n.8;

> Weinberger v. Wiesenfeld, supra, at 645, or when the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination. Califano v. Goldfarb, ante, at 212-216 (plurality opinion), 221-222 (Stevens, J., concurring in the judgment); Weinberger v. Wiesenfeld, supra, at 648.

The Alabama alimony statute utterly fails to meet the Webster standards.

1. The Alabama alimony statute does not seek to redress past discrimination against women.

The discrimination against husbands has been part of the Alabama statute for more than a hundred years. See Ala. Code § 1971 (1854). At no time have the Alabama legislature or courts sought to justify it as designed to redress discrimination practiced against women. On the contrary, the statute's long history and the prevalent view of women at the time of its enactment * make it apparent that the sex line drawn rests on "an attitude of 'romantic paternalism'" (Frontiero v. Richardson, 411 U.S. at 684), "archaic and

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* See generally Johnston, Jr., Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality, 47 N.Y.U.L. Rev. 1033 (1972).

overbroad generalizations" about women (Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)), and "casual assumptions that women are 'the weaker sex' . . . more likely to be . . . dependents" (Califano v. Webster, 430 U.S. 313, 317 (1977)). Indeed, the Alabama courts have explained the statutory discrimination not as a remedy for past stereotyping of women, but as a corollary of the common-law obligation of husbands to support their wives. Davis v. Davis, 279 Ala. 643, 644, 189 So.2d 158,160 (1966); Sims v. Sims, 253 Ala. 307, 316, 45 So.2d 25, 29 (1950); See also Orr v. Orr, 351 So. 2d 906, 908 (1977)(Jones, D. dissenting). This Court has left no doubt that a freshly manufactured "compensatory" rationale cannot serve to cloak the fact that legislation has been based on archaic assumptions; it has declared in no uncertain terms that such assumptions"do not suffice to justify a gender-based discrimination . . . ." Califano v. Goldfarb, 430 U.S. 199, 217 (1977).

2. The Alabama alimony statute penalizes women.

Not only does the Alabama alimony statute fail to redress society's long history of discrimination against women, it is designed to perpetuate that tradition. The statute effectively announces the state's preference for an allocation of family responsibilities under which the wife plays a dependent role. See I.A., supra. Accordingly, the Alabama

alimony statute is also impossible to justify under the second condition ruled essential in Webster.

II.

THE CASE SHOULD BE REMANDED TO THE ALABAMA COURTS FOR DETERMINATION OF THE PROPER, SEX-NEUTRAL APPLICATION OF THE STATE'S LAW.

The appellant's reliance on the unconstitutionality of the Alabama alimony statute is indirect. He is not seeking alimony from his wife. Rather, he is seeking to escape his obligation to pay alimony to her. Although it may be questioned whether a husband in this position can properly raise the constitutional objection, the answer must be in the affirmative. If this Court declares the Alabama statute unconstitutional, and the Alabama courts rule the constitutional defect invalidates the whole statute, there would be no legal basis for requiring a husband to pay alimony. Accordingly, appellant undoubtedly has standing to raise the constitutional issue.

Whether the Alabama statute is constitutional presents a question for ultimate decision by this Court. But the impact on Alabama law of a holding that the gender line is unconstitutional is properly left for resolution by the Alabama courts.

There is no constitutional right to alimony for either sex. The only constitutional requirement is that state law treat both sexes equally. Cf. Stanton v. Stanton, supra, 421 U.S. at 17-18; Craig v. Boren, supra, 429 U.S. at 210 n. 24. Thus, Alabama remains free to disallow alimony or to authorize its award to needy spouses of either sex. Cf. Stanton v. Stanton (II), 429 U.S. 501 (1977), on remand, 564 P.2d 303, rehearing den., 567 P.2d 625 (Utah 1977).

On remand, we would seek to appear amicus curiae before the state courts to urge that, in light of the unconstitutionality of a construction of the alimony statute that denies awards to men, the law be construed to permit awards on a sex-neutral basis. It is true that previous decisions have held the Alabama statute a barrier to such awards. See, e.g., Davis v. Davis, supra. These decisions, however, never took account of the argument that the statute as so construed was unconstitutional. Therefore, the Alabama courts have not yet had an opportunity to adopt a construction that avoids the constitutional difficulty. Nor was that possibility considered by the courts below in this case.*

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* The Court of Civil Appeals considered only whether the statute, as previously construed by the Alabama Supreme Court, violated the equal protection clause. The Alabama Supreme Court disposed of the case summarily by quashing its writ of certiorari as improvidently granted. 351 So.2d 906.

This Court has not hesitated, in dealing with federal statutes extending benefits without sufficient justification to one sex but not to the other, to declare the statute unconstitutional, not in its entirety, but only insofar as it denied benefits to the disfavored sex, and to enter judgments awarding the disputed benefits to claimants apparently barred by the statute. See, e.g., Weinberger v. Wiesenfeld, supra. If the Alabama courts were to adopt the same approach, there would be no constitutional obstacle to requiring the husband to pay alimony in this case. As the Court observed in Stanton, supra, 421 U.S. at 18, "[t]he appellant, although prevailing . . . on the federal constitutional issue," may not ultimately prevail in this lawsuit.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed, §§30-2-51 through 53, Code of Alabama (1975) should be declared unconstitutional insofar as it denies alimony to husbands, and the case should be remanded to permit the Alabama courts to determine the effect of this ruling on Alabama law as applied to this case.

Respectfully submitted,

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* Amicus gratefully acknowledges the assistance provided in the preparation of this brief by Diana T. Tanaka, third year law student at Harvard Law School.